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## JURISDICTIONAL STATEMENT

This appeal is from a conviction for the misdemeanor offense of sexual misconduct in the third degree, Section 566.095, RSMo, 2000. The judgment was entered on July 24, 2001, in the Circuit Court, Associate Division 21, Greene County, Missouri. This appeal involves the constitutional validity of a statute. Therefore, exclusive jurisdiction lies in the Missouri Supreme Court pursuant to Article V, Section 3, Missouri Constitution (as amended 1982).

## STATEMENT OF FACTS

Charles E. Moore ("Appellant"), was charged by the State of Missouri, by misdemeanor information with sexual misconduct in the third degree, pursuant to Section 566.095, RSMo (2000) (Legal file, hereafter "Lf." 1). A bench trial was held before the Honorable Max Bacon, on the 28th day of June, 2001. ("Lf." 14). Judge Bacon found the Appellant guilty beyond a reasonable doubt of sexual misconduct in the third degree.

Viewed in the light most favorable to the verdict, the following facts were adduced at trial: On November 4, 2000, Appellant entered a restaurant in Springfield, Greene County, Missouri. (Trial transcript, hereafter "Tr." 8, 36). Appellant had frequented this restaurant on a daily basis for several months prior to November 4, 2000, and was well acquainted with employees of the restaurant. (Tr. 33). One such employee was a 13 year old girl, T.N.F., whose family owned the restaurant. (Tr. 8). Appellant was retired and drawing social security at the time. (Tr. 31). Appellant was affectionately called "Grandpa" by the people in the restaurant. (Tr. 8).

Upon entering the restaurant, Appellant had a conversation with T.N.F. (Tr. 10). During the course of that conversation, Appellant asked T.N.F. if she was a good dancer, to which she replied yes. (Tr. 10). Appellant then stated to T.N.F. that she "could go home with him and give him a lap dance." (Tr. 10). Appellant next asked T.N.F. if she had "ever had sex," to which she replied

that she had not. (Tr. 11). Appellant then asked T.N.F. if she had "ever gave head or been eaten out." (Tr. 11). When asked at trial what this meant to her, T.N.F. responded that the terms "giving head" or "been eaten out" were references to oral sex." (Tr. 11). Appellant then told T.N.F. that she would have a chance to learn to do these things at his house, to which she replied "I don't know." (Tr. 11). T.N.F. was scared at this point and didn't know what to think. (Tr. 12). Appellant then paid his check, but before leaving the restaurant, he told T.N.F. that "he would kill [T.N.F.] if [she] told anybody" if she told her mother or anybody about the conversation they had. (Tr. 12-13). Appellant then told T.N.F. that he was going home to "look at his little girlies on the the computer" and left the restaurant. (Tr. 13).

Appellant returned to the restaurant two days later, on November 6, 2000. (Tr. 13, 22). T.N.F. saw Appellant, she became scared and upset, and she told someone at the restaurant about the conversation between herself and the Appellant on November 4, 2000. (Tr. 14). Shortly thereafter, the police arrived. (Tr. 14, 22). Officer James Calhoun of the Springfield Police Department spoke with the Appellant at the restaurant after reading him the Miranda warning. (Tr. 24). During that conversation, Appellant admitted to Officer Calhoun that he had a conversation with T.N.F. about sex and specifically had asked her if "she had ever given head or had she ever been eating out - - eaten out." (Tr. 26). When asked by Officer Calhoun, Appellant

denied that he asked T.N.F. if she wanted him to teach her and that denied soliciting sex from T.N.F. (Tr. 26, 28). Appellant was arrested at that point. (Tr. 28).

## POINT RELIED ON

**THE TRIAL COURT DID NOT ERR IN FINDING THE APPELLANT, CHARLES MOORE, GUILTY OF SEXUAL MISCONDUCT IN THE THIRD DEGREE PURSUANT TO SECTION 566.095, RSMO, BECAUSE THERE WAS SUFFICIENT EVIDENCE TO CONVICT THE APPELLANT OF THIS OFFENSE AND SECTION 566.095, RSMO, IS NOT UNCONSTITUTIONAL IN THAT SECTION 566.095 GOVERNS CONDUCT WHICH CAN BE REGULATED BY THE STATE OF MISSOURI.**

*Cohen v. California*, 403 U.S. 15, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971)

*Rowan v. U.S. Post Office Dept.*, 397 U.S. 728, 90 S.Ct. 1484, 25 L.Ed.2d 736 (1970).

*State v. Koetting*, 616 S.W.2d 822 (Mo.1981)

*State v. Roberts*, 779 S.W.2d 576 (Mo. banc 1989)

Section 566.095 RSMo, 2000

## ARGUMENT

**THE TRIAL COURT DID NOT ERR IN FINDING THE APPELLANT, CHARLES MOORE, GUILTY OF SEXUAL MISCONDUCT IN THE THIRD DEGREE PURSUANT TO SECTION 566.095, RSMO, BECAUSE THERE WAS SUFFICIENT EVIDENCE TO CONVICT THE APPELLANT OF THIS OFFENSE AND SECTION 566.095, RSMO, IS NOT UNCONSTITUTIONAL IN THAT SECTION 566.095, RSMO, GOVERNS CONDUCT WHICH CAN BE REGULATED BY THE STATE OF MISSOURI.**

*STANDARD OF REVIEW*

Respondent submits that this Court should review Appellant's point, if at all, under the plain error of review standard because Appellant has substantially failed to comply with Rule 84.04(c), Missouri Court Rules 2002. Rule 84.04(c) requires that "[t]he statement of facts shall be a fair and concise statement of the facts relevant to the questions presented for determination without argument." *Id.* Appellant's statement of facts, "which consists of nothing more than abbreviated procedural history, fails to provide an understanding of the case and is deficient." *Murray v. Missouri Real Estate Com'n,* 858 S.W.2d 238, 239 (Mo.App. 1993); *Carrier v. City of Springfield,* 852 S.W.2d 196, 198 (Mo.App. 1993). "Failing to substantially comply with Rule 84.04 preserves nothing for appellate review." *Murray,* 858 S.W.2d at 239. As such,

if Appellant's brief should even be reviewed by this Court, Respondent respectfully submits that review should be for plain error only.

*ARGUMENT*

Both the First Amendment to the United States Constitution and Article 1, Section 8, of the Missouri Constitution confer upon the citizens of Missouri freedom of speech. This freedom is not to be taken lightly and must be protected. However, this freedom is not absolute. Some forms of speech have been prohibited after a close examination and balancing of the speech being prohibited and the governmental interest in restricting that speech. The analytical framework for conducting the appropriate balancing test is determined by the nature of the prohibited speech and the type of challenge.

The legislature in Missouri adopted Section 566.095, RSMo, in 1994. This statute expressly prohibits solicitations or requests to another person to engage in sexual conduct when the speaker knows that such a request is likely to cause an affront or alarm. *See* Section 566.095, RSMo (1994). In this case, the defendant, a sixty-one year old man solicited a thirteen year old girl for sex. The defendant's conduct is exactly the type of conduct this statute is designed to prohibit. A thirteen year old girl working in her family restaurant should not be subjected to a sexual solicitation by a customer more than four times her age.

The defendant claims Section 566.095, RSMo, is overbroad. While the defendant does have standing to make such a challenge, his allegation fails when the appropriate standards are applied. In *State v. Helgoth,* 691 S.W.2d 281 (Mo. 1985), the Missouri Supreme Court adopted the two part overbreadth analysis announced by the United States Supreme Court in *Broadrick v. Oklahoma,* 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973). First, the overbreadth doctrine should be used sparingly and only as a "last resort". *Helgoth* at 285; *Broadrick* at 614, 2915. Secondly, "where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick* at 614, 2915. The statute at issue before this Court involves both conduct and speech.

Appellant's argument is misguided because it is entirely focused on the speech being prohibited. The purpose of this statute is not to prohibit speech with sexual content. Instead, this statute is designed to prohibit a solicitation for sex which the solicitor knows is likely to cause affront or alarm. The act of solicitation is conduct. A solicitation to engage in sexual conduct is not an expression of ideas or concepts. Additionally, not all solicitations are prohibited. Only solicitations which the speaker knows are likely to cause affront or alarm are prohibited. There is no dispute that some speech is being prohibited by the

statute. However, there is a compelling state interest in prohibiting such conduct, whether the victim is a child or an adult.

The State of Missouri has a compelling interest to protect its citizens of all ages from unlawful and unwanted sexual advances. The police powers of the state allows the prohibition of speech that involves criminal activity. In *State v. Roberts*, 779 S.W.2d 576 (Mo. banc 1989), the appellants claimed that the prohibitions against prostitution found in Sections 567.010 and 567.020, RSMo, infringed upon their first amendment rights. The Missouri Supreme Court held, "The criminalization of prostitution, or commercial sexual acts, is a valid exercise of the State's police power…. Because the words uttered as an integral part of the prostitution transaction do not have a lawful objective, they are not entitled to constitutional protection." *Roberts* at 579.

The United States Supreme Court upheld a federal statute which prohibited unwanted sexual solicitations from being sent through the mail in *Rowan v. U.S. Post Office Dept.*, 397 U.S. 728, 90 S.Ct. 1484, 25 L.Ed.2d 736 (1970). At issue was a federal statute providing a procedure whereby an individual could prevent advertisements from being sent to his home which he believed to be erotically arousing or sexually provocative. Advertisers challenged this statute claiming a violation of their First Amendment rights. The advertisers claimed that freedom of speech included the freedom to communicate by sending information and solicitations through the mail. The

United States Supreme Court "categorically reject[ed] the argument that a vendor has a right under the Constitution or otherwise to send unwanted material into the home of another." *Rowan* at 738, 1491. The statute was upheld because, "Nothing in the Constitution compels us to listen to or view any unwanted communication, whatever its merit." *Rowan* at 737, 1480.

The Missouri Supreme Court used a very similar analysis in deciding *State v. Koetting*, 616 S.W.2d 822 (Mo.1981). At issue in *Koetting*, was the constitutionality of Section 565.090, RSMo, the crime of harassment. The appellant claimed that the statute was overbroad and violated his first amendment right to free speech. The defendant was convicted for making repeated telephone calls and statements over the telephone. The Missouri Supreme Court held that the government may prohibit speech when the statute is designed to protect persons within their own homes. *Koetting* at 827. In reaching that decision, the Missouri Supreme Court referenced the United States Supreme Court in *Cohen v. California*, 403 U.S. 15, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971), and stated "when a speaker's exercise of his right of expression substantially infringes upon another's right to be free from such expressions, the state's regulation thereof is permissible and warranted." *Koetting* at 826.

Appellant's reliance on *Reno v. ACLU*, 521 U.S. 844, 1175 S.Ct. 2329, 13 L.Ed.2d 874 (1997), is misplaced. The United States Supreme Court ruled

the federal statute at issue in *Reno* was unconstitutional for being overbroad and vague. The federal statute dealt with more than just solicitations or requests to engage in sexual conduct. The federal statute criminalized the knowing dissemination of obscene or indecent material to minors by using the Internet. The federal statute applied to "any comment, request, suggestion, proposal, image, or other communication which is obscene or indecent." 47 U.S.C.A. section 223(a), Supp. 1997. The United States Supreme Court found the term "indecent" to be vague. [Note that both the United States Supreme Court and the Missouri Supreme Court have allowed for obscene speech to be prohibited. *See Koetting* at 827, *Cohen* at 21, 1786.] The term "indecent" was vague because it was undefined. The federal statute was declared overbroad because it went beyond its stated purpose of protecting minors. *See Reno* at 884, 2351. The United States Supreme Court found there is no way to effectively monitor or control an audience because the Internet is so expansive. *Id.* at 885, 2351. The reasonable inference could be made that anyone transmitting information on the Internet would have to know that it is likely for a minor to view a prohibited communication. Therefore, this federal statute would unconstitutionally limit almost all types of sexual transmissions because anyone posting sexual material could face criminal charges. In *Reno,* the United States Supreme Court protected free speech with sexual content. The United States

Supreme Court did not protect the conduct of soliciting someone to engage in sexual conduct when the request is knowingly likely to cause affront or alarm.

The Missouri Statute at issue is neither overbroad nor vague. The State of Missouri has a compelling interest to protect its citizens from unwanted sexual advances. The police powers allow a state to prohibit conduct and behavior. Advances which result in non-consensual touching or exhibitionism are prohibited forms of sexual misconduct in the first and second degree. *See* Sections 566.090 and 566.093 RSMo, (1994). The crime of sexual misconduct in the third degree, Section 566.095, RSMo, prohibits the conduct of solicitation when the speaker knows the solicitation will likely cause an affront or alarm. This prohibited sexual solicitation is similar to the solicitation in *Roberts* where the speaker knows he is offering to pay for sex. This Court's ruling should be consistent with the *Roberts'* ruling because "the words do not have a lawful objective they are not entitled to constitutional protection." *See Roberts*, 779 S.W.2d at 579. Further, as in *Koetting*, this statute prohibits an exercise of speech which "substantially interferes with another's right to be free from such expressions" and is a proper exercise of police powers. *See Koetting*, 616 S.W. 2d at 826.

The statute is not overbroad because only the solicitation or request, the actual conduct, is being prohibited. The statute is not vague because there is a mens rea element. The speaker must know that the solicitation or request will

likely cause an affront or alarm. If the evidence does not support this element, the speaker cannot be found guilty.

A sexual solicitation is not "speech" which must be protected by the first amendment. The first amendment gives special protection to assure the free exchange of political and social ideas. "All ideas having even the slightest redeeming social importance - unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion - have the full protection of the guaranties." *State v. Vollmar*, 389 S.W.2d 20, 27 (Mo. Sct. 1965) citing *Roth v. United States*, 354 U.S. 467, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957). If the defendant wanted to espouse the idea that minors should be allowed to engage in sex with adults, this statute does not prohibit such speech. However, this statute does prevent conduct, i.e., his solicitation of a minor, or any person for that matter, to engage in sexual conduct when he knows it is likely to cause affront or alarm.

The trial court found that the defendant knew his conduct would cause an affront or alarm. If the minor had agreed to engage in sex, appellant would be guilty of statutory rape. Appellant's conduct would be punished without regard to any opinion he expressed about such acts. Section 566.095, RSMo, prohibits the conduct of solicitation. It protects the citizens of this State from being solicited to engage in sex when the speaker knows his solicitation will

likely cause affront or alarm. This is a valid operation of the police powers granted to the state to ensure the rights of its citizens are not violated.

## CONCLUSION

For the above foregoing reasons, the State respectfully requests this Court to uphold the judgment of the Associate Circuit Court of Greene County against Appellant for sexual misconduct in the third degree.

Respectfully submitted,
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## CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing instrument was served upon the Appellant's attorney, Bruce Galloway by hand delivering a copy of this file to the Office of Bruce Galloway, located in Springfield, Missouri, on this ____ day of June, 2002.

_____

## CERTIFICATE OF COMPLIANCE WITH RULE 84.06

The undersigned certifies that Respondent's brief does not contain more than 27,900 words. A copy of Respondent's brief is copied onto a diskette, which has been scanned and is virus free.

_____

IN THE MISSOURI SUPREME COURT
JEFFERSON CITY, MISSOURI

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CASE NO. SC 84495

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CHARLES ELDON MOORE, )
)
APPELLANT, )
)
VS. )
)
STATE OF MISSOURI )
)
RESPONDENT, )

ON APPEAL FROM THE ASSOCIATE CIRCUIT COURT
OF GREENE COUNTY, MISSOURI

HONORABLE MAX BACON, ASSOCIATE CIRCUIT JUDGE

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# BRIEF FOR RESPONDENT

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